

No. 06-278

---

---

IN THE  
**Supreme Court of the United States**

---

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

*Petitioners,*

v.

JOSEPH FREDERICK,

*Respondent.*

---

**On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit**

---

**BRIEF FOR PETITIONER**

---

KENNETH W. STARR

*Counsel of Record*

RICK RICHMOND

ERIC W. HAGEN

KIRKLAND & ELLIS LLP

777 South Figueroa Street

34<sup>th</sup> Floor

Los Angeles, CA 90017

(213) 680-8400

*Attorneys for Petitioners*

January 16, 2007

---

---

### **QUESTIONS PRESENTED**

1. Whether the First Amendment allows public schools, at school-sponsored, faculty-supervised events, to prohibit students from displaying messages promoting the use of illegal substances.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW .....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED .....	1
STATEMENT OF THE CASE .....	2
A.    Factual Background.....	2
B.    Procedural History.....	8
SUMMARY OF ARGUMENT.....	14
ARGUMENT .....	17
I.    THE JUNEAU SCHOOL OFFICIALS DID NOT VIOLATE FREDERICK’S FIRST AMENDMENT RIGHTS WHEN THEY DISCIPLINED HIM FOR VIOLATING SCHOOL POLICIES AGAINST PROMOTING ILLEGAL SUBSTANCES AT A SCHOOL ACTIVITY.....	18
A.    The “special characteristics” of the school setting require deference for school officials’ actions.....	18
1. <i>Tinker</i> protects speech that does not intrude upon the work of the schools. ....	20
2. <i>Fraser</i> permits schools to prohibit student speech that undermines the basic educational mission. ....	21

3.	<i>Kuhlmeier</i> allows student speech restrictions in school-sponsored activities when pursuant to legitimate pedagogical concerns.....	24
B.	The <i>Tinker-Fraser-Kuhlmeier</i> trilogy permitted Juneau school officials to discipline Frederick for promoting illegal substances.....	25
1.	Discouraging use of illegal substances is an undeniably important educational mission.....	26
2.	Frederick's pro-drug banner interfered with decorum by radically changing the focus of a school activity.....	30
3.	Principal Morse properly disassociated the school from Frederick's pro-drug banner.....	32
C.	Frederick was subject to school disciplinary rules.....	34
II.	PRINCIPAL MORSE WAS ENTITLED TO QUALIFIED IMMUNITY IN ENFORCING A FACIALLY VALID STUDENT CONDUCT POLICY.....	35
A.	The hallmark of qualified immunity is the objective legal reasonableness of the official's act under law clearly established at the time of the act.....	35
B.	Principal Morse reasonably believed that she was lawfully enforcing School Board policy against promoting illegal substances.....	38

C.	Longstanding policies against promoting illegal substances never have been deemed unlawful, even in the dissonant body of student speech law. ....	40
D.	The Ninth Circuit departed from fundamental qualified immunity principles. ....	43
1.	The court of appeals' <i>post-hoc</i> threshold inquiry steered the analysis astray.....	44
2.	The court of appeals confused general legal propositions for a clearly established right. ....	44
3.	The court of appeals abandoned the critical inquiry whether Principal Morse's actions were objectively legally unreasonable in the particular circumstances. ....	47
	CONCLUSION .....	49

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987) .....	37, 38, 39, 48
<i>Anheuser-Busch, Inc. v. Schmoke</i> , 101 F.3d 325 (4th Cir. 1996).....	30
<i>Bannon v. Sch. Dist. of Palm Beach County</i> , 387 F.3d 1208 (11th Cir. 2004).....	29
<i>Barber v. Dearborn Pub. Sch.</i> , 286 F. Supp. 2d 847 (E.D. Mich. 2003).....	28
<i>Bd. of Educ. v. Earls</i> , 536 U.S. 822 (2002) .....	18, 27
<i>Bethel Sch. Dist. No. 403 v. Fraser</i> , 478 U.S. 675 (1986) .....	<i>passim</i>
<i>Boroff v. Van Wert City Bd. of Educ.</i> , 220 F.3d 465 (6th Cir. 2000).....	11, 28
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954) .....	18
<i>Burch v. Barker</i> , 861 F2d 1149 (9th Cir. 1988).....	45, 46
<i>Burnside v. Byars</i> , 363 F.2d 744 (5th Cir. 1966).....	31
<i>Chandler v. McMinnville Sch. Dist.</i> , 978 F.2d 524 (9th Cir. 1992).....	45, 46

<i>Consol. Edison Co. v. Public Serv. Comm'n of N.Y.</i> , 447 U.S. 530 (1980) .....	32
<i>Cox v. Louisiana</i> , 379 U.S. 536 (1965) .....	31
<i>Denno v. Sch. Bd. of Volusia County</i> , 218 F.3d 1267 (11th Cir. 2000).....	41
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968) .....	19
<i>Gano v. Sch. Dist. No. 411</i> , 674 F. Supp. 796 (D. Idaho 1987).....	29
<i>Ginsburg v. New York</i> , 390 U.S. 629 (1968) .....	23
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (2d Cir. 1949).....	36
<i>Guiles v. Marineau</i> , 461 F.3d at 320 (2d Cir. 2006) .....	30, 41
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	35, 36, 46, 48
<i>Harper v. Poway Unified Sch. Dist.</i> , 445 F.3d 1166 (9th Cir. 2006).....	41
<i>Hazelwood Sch. Dist. v. Kuhlmeier</i> , 484 U.S. 260 (1988) .....	<i>passim</i>
<i>Hosty v. Carter</i> , 412 F.3d 731 (7th Cir. 2005).....	41
<i>Int'l Action Ctr. v. United States</i> , 365 F.3d 20 (D.C. Cir. 2004) .....	37

<i>Lavine v. Blaine Sch. Dist.</i> , 257 F.3d 981 (9th Cir. 2001).....	44
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001) .....	26
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986) .....	16, 35
<i>McCann v. Fort Zumwalt Sch. Dist.</i> , 50 F. Supp. 2d 918 (E.D. Mo. 1999).....	29
<i>McIntire v. Bethel Sch.</i> , 804 F. Supp. 1415 (W.D. Okla. 1992) .....	29, 41
<i>Miller v. California</i> , 413 U.S. 15 (1973) .....	23
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985) .....	19, 31
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) .....	19
<i>Newsome v. Albemarle County Sch. Bd.</i> , 354 F.3d 249 (4th Cir. 2003).....	44
<i>Nixon v. N. Local Sch. Dist.</i> , 383 F. Supp. 2d 965 (S.D. Ohio 2005).....	28
<i>Noy v. State</i> , 83 P.3d 545 (Alaska Ct. App. 2003) .....	44
<i>Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.</i> , 941 F.2d 817 (9th Cir. 1991).....	29

<i>Saucier v. Katz</i> , 533 U.S. 194 (2001) .....	<i>passim</i>
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974) .....	36
<i>Scott v. Sch. Bd. of Alachua County</i> , 324 F.3d 1246 (11th Cir. 2003) .....	44
<i>Sypniewski v. Warren Hills Reg'l Bd. of Educ.</i> , 307 F.3d 243 (3d Cir. 2002) .....	44
<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969) .....	<i>passim</i>
<i>Vernonia Sch. Dist. 47J v. Acton</i> , 515 U.S. 646 (1995) .....	18, 19, 26, 27
<i>Williams v. Spencer</i> , 622 F.2d 1200 (4th Cir. 1980) .....	29
<i>Wilson v. Layne</i> , 526 U.S. 603 (1999) .....	<i>passim</i>
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975) .....	36

### **Constitutional Provisions**

U.S. Const. Amend. I .....	<i>passim</i>
U.S. Const. Amend. IV .....	27, 37, 38, 48
U.S. Const. Amend. XIV .....	1, 24

**Statutes**

20 U.S.C. § 7101 et seq.....	1, 27
20 U.S.C. § 7114(d)(6).....	7, 27, 42
28 U.S.C. § 1254(1).....	1
42 U.S.C. § 1983 .....	i, 2, 10
Alaska Admin. Code tit. 4, § 07.010.....	28, 42

**School District Rules**

Juneau School Board Policy 5520.....	2, 7, 39
Juneau School Board Policy 5850.....	2, 8, 34, 39

**Other Authorities**

<i>A weeklong celebration of the Olympic spirit,</i> Juneau Empire, Jan. 16, 2002, available at <a href="http://juneauempire.com/stories/011602/spo_calendar.shtml">http://juneauempire.com/stories/011602/ spo_calendar.shtml</a> .....	3
Charles Bingham, <i>The Olympic Torch Relay comes to Juneau</i> , Juneau Empire, Jan. 16, 2004, available at <a href="http://juneauempire.com/stories/011602/spo_junearelay.shtml">http://juneauempire.com/stories/011602/ spo_junearelay.shtml</a> .....	2, 4, 32
Erwin Chemerinsky, <i>Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?</i> , 48 Drake L. Rev. 527 (2000).....	42
Douglas W. Kmiec et al., <i>Individual Rights and the American Constitution</i> (2004).....	41

Cindy Lavorato & John Saunders, <i>Public High School Students, T-shirts, and Free Speech: Untangling the Knots</i> , 209 Ed. Law Rep. 1 (2006).....	41
John Stuart Mill, <i>On Liberty</i> (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).....	19
Justin T. Peterson, Comment, <i>School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?</i> , 3 Mich. St. L. Rev. 931 (2005).....	41
3 James A. Rapp, <i>Education Law</i> (2006).....	34
<i>The torch's route through Juneau has 3 segments</i> , Juneau Empire, Jan. 16, 2002, available at <a href="http://juneauempire.com/stories/011602/spo_torchroute.shtml">http://juneauempire.com/stories/011602/spo_torchroute.shtml</a> . ....	3

### OPINIONS BELOW

The orders of the United States District Court for the District of Alaska (per Sedwick, C.J.) granting petitioners' summary judgment motion are reprinted at Pet. App. 23a-44a and are reported at 2003 WL 25274689 and 2003 U.S. Dist. LEXIS 27270. The Ninth Circuit's decision reversing the district court is reprinted at Pet. App. 1a-22a and is published at 439 F.3d 1114. The court of appeals' order denying rehearing and rehearing en banc is reprinted at Pet. App. 45a-46a and is not otherwise published.

### JURISDICTION

The Ninth Circuit rendered its decision on March 10, 2006, and denied rehearing and rehearing en banc on April 18, 2006. Justice Kennedy extended the time to file a petition for a writ of certiorari to and including August 28, 2006. The petition for a writ of certiorari was filed on August 28, 2006, and was granted on December 1, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

Congress shall make no law ... abridging the  
freedom of speech . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No State shall ... deprive any person of life,  
liberty, or property, without due process of law  
. . . .

Title 20, Sections 7101 *et seq.* of the United States Code, codifies the Safe and Drug-Free Schools and Communities Act, pertinent parts of which are reprinted at Pet. App. 47a-51a.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress  
....

Juneau School Board Policy 5520, reprinted at Pet. App. 53a-54a, states, in pertinent part:

The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .

Juneau School Board Policy 5850, reprinted at Pet. App. 58a, states, in pertinent part:

Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program.

## STATEMENT OF THE CASE

### A. Factual Background

1. January 24, 2002 marked the first time in Olympic history that the Olympic Torch Relay visited Alaska. Charles Bingham, *The Olympic Torch Relay comes to Juneau*, Juneau Empire, Jan. 16, 2004, available at [http://juneauempire.com/stories/011602/spo\\_junearelay.shtml](http://juneauempire.com/stories/011602/spo_junearelay.shtml). In preparation, a local task force of approximately two dozen local civic leaders planned for Juneau's participation in the

international event—a ten-mile relay through Juneau. *Id.* Members of the city government, including the mayor's office and the Juneau Department of Parks and Recreation, lent their support. *Id.* Local businesses, as well as national sponsors of the torch relay, supported the event. *Id.* The torch ceremony involved a week of community festivities. *A weeklong celebration of the Olympic spirit*, Juneau Empire, Jan. 16, 2002, available at [http://juneauempire.com/stories/011602/spo\\_calendar.shtml](http://juneauempire.com/stories/011602/spo_calendar.shtml). Upon its arrival in Juneau, the Olympic flame was welcomed by Tlingit Clan dancers, transported in a native canoe around Gastineau Channel, and carried through several miles of Juneau's streets, including past the State Capitol and the Juneau-Douglas High School. *The torch's route through Juneau has 3 segments*, Juneau Empire, Jan. 16, 2002, available at [http://juneauempire.com/stories/011602/spo\\_torchroute.shtml](http://juneauempire.com/stories/011602/spo_torchroute.shtml).

Believing that the Olympic Torch Relay had noteworthy educational value (as well as high significance to the community), the Juneau School District allowed students to observe and participate in the ceremony. Pet. App. 34a. In addition, the School District allocated funds to transport students from schools not along the relay route to locations where they could view this memorable event. Pet. App. 63a.

After classes convened on the morning of the event, Juneau-Douglas High School administrators and teachers accompanied students from their classrooms to view the relay as it passed on Glacier Avenue in front of the school. Pet. App. 24a-25a, 34a. Once outside the classroom, the students were allowed to be in only one place—in front of the school, either on campus or lined along either side of the street. J.A. 23-24, 47-56. At all times, the student body remained under the supervision of high school administrators, teachers, and staff. *Id.*

During the event, high school cheerleaders were out in uniform to greet the torchbearers. Pet. App. 34a. The high

school pep band played. *Id.* Four high school students, representing various segments of the student body, acted as torchbearers. J.A. 23. In that role, the student torchbearers carried the Olympic flame as a small part of the 11,500-person chain of torchbearers who transported the torch along the 65-day, 46-State, 13,500-mile relay route. Bingham, *supra*.

2. Joseph Frederick, a Juneau-Douglas High School student, and several of his schoolmates positioned themselves on the sidewalk opposite the campus to await the torch relay. Pet. App. 25a. Before the torch arrived, Principal Deborah Morse approached this group to investigate the throwing of snowballs and beverage bottles that originated from their vicinity. J.A. 24, 41, 43. As the torchbearers and television camera crews approached, Frederick and his friends unfurled a large banner emblazoned with the phrase “BONG HiTS 4 JESUS.” Pet. App. 25a. Frederick’s banner—which measured (by his estimation) 14 feet long—was clearly visible to the large number of students assembled on campus. J.A. 24; Pet. App. 70a; Opp’n to Pet. at 1 n.1.<sup>1</sup>

a. “Bong” is a slang term for drug paraphernalia commonly used for smoking marijuana. J.A. 24, 59-60, 117. A “bong hit” is slang for inhaling marijuana from such a device. Pet. App. 4a; J.A. 24, 60-61. The term “bong hits” is widely understood by high school students (and others) as referring to smoking marijuana. Pet. App. 38a, 61a-62a; J.A. 24, 60-61. Frederick himself testified that “[m]any people

---

<sup>1</sup> At the certiorari stage, respondent attempted to recast the banner incident as involving himself and several non-students. See Opp’n to Pet. at 11 (stating he was “joined with non-students to display a banner”). The record evidence identified only one non-student who may have been involved in the incident. Pet. App. 70a; J.A. 29, 35, 36.

reference [the phrase ‘bong hits’] to drugs.” J.A. 63. He also conceded that he “knew it was a possibility” that people would “interpret . . . bong hits as related to drugs” and that “there is a general amount of people who can understand the meaning of it [as a drug reference].” J.A. 61, 64. The combination of the phrases “bong hits” and “4 Jesus,” according to Frederick, was intended to be a publicity stunt—something “controversial and yet ultimately meaningless.” J.A. 66-67. “Christian people,” he explained, “I believe they are anti-drugs, so if you put that together, it’s somewhat ironic.” J.A. 67. He further acknowledged that “some people might have taken offense.” J.A. 63.

b. Prior to displaying the banner, Frederick had been absent from school. Pet. App. 25a. Having skipped his first class of the day, Frederick later claimed that his car was stuck in the snow. Pet. App. 64a. Frederick neither called the school to report his absence, nor informed the office of his presence when he arrived. *Id.*; J.A. 72-73. Frederick made no secret of the fact that, in positioning himself near the school to await the relay, he was purposely avoiding going onto school grounds. J.A. 28-29, 73. Although he could have selected any number of locations to unfurl his banner along the Olympic Torch’s ten-mile journey through Juneau, Frederick chose instead to position himself in front of the student body and to display the banner where it would be in full view of the assembled students.

c. Spotting the drug-related display, Principal Morse approached Frederick and his friends and asked them to drop the banner. Pet. App. 25a. While other students complied with the request, Frederick refused to take it down. *Id.* Frederick claimed he had a First Amendment right to display the banner because he was not physically on campus. J.A. 24-25. Principal Morse responded that Frederick was participating in a school activity and that the banner was inappropriate. Pet. App. 3a; J.A. 25. When Frederick

refused to put the banner down, Principal Morse began rolling it up and directed Frederick to accompany her to her office. Pet. App. 25a; J.A. 10, 16. Frederick let go of the banner and walked the other way. Pet. App. 25a.

Frederick did not meet with Principal Morse until he was later summoned out of class and escorted to her office. There, Ms. Morse again explained that the banner was inappropriate in that it violated the school's policy against displaying offensive material, including material that advertises or promotes the use of illegal drugs. Pet. App. 3a; J.A. 25. During the meeting, Frederick displayed a belligerent attitude and gave evasive and mocking answers to her questions. Pet. App. 65a. He told her, for example, that the banner was an acronym for "Better Olympic National Games – Head into Town 4 Jesus." Pet. App. 61a; J.A. 25-26; S.E.R. 35.<sup>2</sup>

After discussing the incident with a defiant and uncooperative Frederick, Principal Morse suspended him for ten days based on multiple infractions, including refusal to respond to a staff directive, truancy/skipping class, defiance/disruptive behavior, and refusal to cooperate/assist in investigation, in addition to the underlying charge of displaying the offensive banner. Pet. App. 59a, 66a-67a. Ms. Morse provided Frederick with a written Notification of Suspension, which listed the grounds for his punishment and advised him that he had the right to appeal. J.A. 106-07.

Following the banner episode, school personnel reported several incidents of pro-drug graffiti in the halls and on school grounds, including references to and mimicry of Frederick's banner. Pet. App. 2a; J.A. 43.

---

<sup>2</sup> "S.E.R." refers to the Appellees' (Petitioners') Supplemental Excerpts of Record in the Ninth Circuit.

3. The student conduct rules enforced by Principal Morse are published in the school district policies and the student handbook. Pet. App. 52a-58a; J.A. 80-105. In its policies, the Juneau School Board explicitly recognizes that students have “constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly.” Pet. App. 53a (Juneau Sch. Bd. Policy 5520). In that context, forbidden expressive conduct includes activities “that interfere[] with the orderly operation of the educational program,” such as “any assembly or public expression that . . . advocates the use of substances that are illegal to minors.” *Id.* Messages promoting illegal drugs, alcohol, and tobacco are likewise prohibited on student clothing and in student publications because such messages are “inconsistent with the district’s educational mission and disruptive to the district’s educational program.” Pet. App. 52a, 56a.

These policies are consistent with federal law, namely 20 U.S.C. § 7114(d)(6), which requires school districts receiving federal funds through the vehicle of the Safe and Drug Free Schools and Communities Act to certify periodically that their programs “convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful.” The Juneau School District receives funds through this statutory mechanism and has complied with federal certification requirements. *See* S.E.R. 52-63. Indeed, the School Board promulgated a district-wide health and safety curriculum emphasizing the dangers of illegal drug and alcohol use. J.A. 80, 83-84. The Board also established detailed policies for prevention, intervention, and discipline of students engaging in the illegal use or possession of drugs or alcohol. J.A. 84-96.

In addition, the Board policies more generally address disorderly and disruptive behavior. J.A. 81-83. Under the policies, Principal Morse was authorized “to take such means as may be reasonably necessary to control the disorderly

